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No. 84-1309

In the Supreme Court of the United States

OCTOBER TERM, 1984

EULA B. STARNES, ET AL., PETITIONERS

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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After remand by this Court for further consideration in light of *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984), the court of appeals held that the district court did not have jurisdiction to entertain petitioners' challenge to instructions by the Secretary of Health and Human Services to insurance carriers regarding the amount of benefits to be paid for certain services under Part B of the Medicare Program. Petitioners seek review of that holding.

1. a. The named petitioners in this nationwide class action are Medicare beneficiaries enrolled in Part B of the Medicare Program and physicians and physician-directed clinics that provide computerized tomography (CT) scans to Medicare beneficiaries. Petitioners commenced the instant action on November 27, 1979, in the United States District Court for the District of South Carolina to challenge memoranda and a formal intermediary letter, sent by

the Secretary to insurance carriers administering the Medicare Part B Program on her behalf, that established limits on the amount of benefits that would be paid for CT head scans.[1] Petitioners contended, inter alia, that the Secretary's actions constituted rulemaking without notice and opportunity for comment, in violation of the Administrative Procedure Act, 5 U.S.C. 553(b).

On October 6, 1980, the district court entered a preliminary injunction barring enforcement of the limitation on payments for CT head scans until such time as the Secretary promulgated regulations in accordance with the notice and comment provisions of the APA (Pet. App. 32-33). The district court held that it could exercise jurisdiction over the case under 28 U.S.C. 1331, notwithstanding the preclusion of review in 42 U.S.C. 405(h) (as incorporated into the Medicare Program by 42 U.S.C. 1395ii), which provides that no action shall be brought against the Secretary under 28 U.S.C. 1331 "to recover on any claim arising under" the Medicare Act. The court reasoned that this Court's decision in *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), holding that Section 405(h) bars the exercise of jurisdiction under 28 U.S.C. 1331 over any claim arising under the Social Security Act, is inapplicable where the claim is not otherwise reviewable under the Social Security Act. Pet. App. 29.

b. On the Secretary's interlocutory appeal pursuant to 28 U.S.C. 1292(b), the court of appeals affirmed the district court's jurisdictional ruling (Pet. App. 7-24). The court of appeals held that although Congress clearly has foreclosed judicial review of a carrier's determination of the amount of benefits payable under Part B for a particular service (see

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[1]The background of the case is more fully described in the petition for a writ of certiorari filed on behalf of the Secretary in *Heckler* v. *Starnes*, No. 83-1149.

United States v. *Erika, Inc.*, 456 U.S. 201 (1982); 42 U.S.C. 1395ff), it has not precluded APA-type challenges to the Secretary's rules and instructions where the plaintiff does not actually seek an award of benefits, but instead seeks only prospective relief (Pet. App. 13-17). For similar reasons, the court of appeals held that jurisdiction under 28 U.S.C. 1331 is not foreclosed by 42 U.S.C. 405(h) (Pet. App. 17-21). In the alternative, the court of appeals held that petitioners' challenge could be heard under the mandamus statute, 28 U.S.C. 1361 (Pet. App. 22-24).

c. The Secretary filed a petition for a writ of certiorari to review the court of appeals' jurisdictional holding. This Court granted the petition, vacated the judgment of the court of appeals, and remanded the case to the court of appeals for further consideration in light of the recent decision in *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984). See *Heckler* v. *Starnes*, No. 83-1149 (June 4, 1984).

d. On remand, the court of appeals held that Ringer required dismissal of the complaint for lack of jurisdiction (Pet. App. 1-3). The court explained (*id.* at 3):

> *Ringer* establishes that we misread *Erika*. *Ringer* decides that [petitioners'] contention that there were procedural irregularities in the promulgation of the [reimbursement] caps [is] so inextricably intertwined with a claim for benefits that any judicial review is barred by 42 U.S.C. § 1395ff. *See Ringer*, — U.S. at — n.4, and —. It follows that * * * the district court lacked jurisdiction under 28 U.S.C. §§ 1331 and 1361, and that the district court must dismiss the action for lack of subject matter jurisdiction.

2. The decision of the court of appeals is correct, is compelled by this Court's decisions in *United States* v. *Erika, Inc.*, and *Heckler* v. *Ringer*, and is consistent with the Sixth Circuit's decision in the other Part B Medicare

case that this Court remanded for further consideration in light of *Ringer*.

a. The court of appeals was clearly correct in holding that judicial review is barred under this Court's decisions in *Erika* and *Ringer*. In *Erika*, the Court held that because Congress has provided in 42 U.S.C. 1395ff for judicial review of the "amount of benefits" under Part A of the Medicare Program but not under Part B, Congress has "deliberately * * * foreclose[d]" judicial review under Part B. 456 U.S. at 208. The Court found this conclusion reinforced by the legislative history of Section 1395ff, which evidenced a congressional intent to remove from the courts what were expected to be relatively minor disputes over the amount of benefits under Part B. 456 U.S. at 208-210. Moreover, as the court below recognized even in its first opinion in this case (Pet. App. 15), the foreclosure of judicial review under Part B was intended to apply even where the plaintiff challenges an instruction or regulation issued by the Secretary that has the effect of limiting the amount of benefits the carrier will pay on an individual claim. Indeed, in *Erika* itself, the plaintiff's claim to increased benefits was based in part on a challenge to the validity of instructions issued by the Secretary that limited the amount of benefits that could be awarded by the carrier. See *Erika, Inc.* v. *United States*, 634 F.2d 580, 589 (Ct. Cl. 1980).

In its first opinion, however, the court of appeals in the instant case held that the preclusion of review this Court recognized in *Erika* applied only where the plaintiff sought to reopen a prior determination by the carrier regarding the amount of reimbursement for a particular service, and did not preclude a court from entertaining a suit for prospective relief that challenged the validity of the Secretary's reasonable charge instructions on APA grounds (Pet. App. 13, 16-17). The decision in *Ringer* establishes that this reasoning was erroneous. The plaintiffs in *Ringer* challenged the

Secretary's denial of benefits for BCBR surgery under Part B as well as Part A, and they contended, inter alia, that the Secretary's instructions barring payment were invalidly promulgated because the Secretary had not followed the notice and comment provisions of the APA. Slip op. 5 n.4, 10. The Court nevertheless held that under its decisions in *Erika* and *Schweiker* v. *McClure*, 456 U.S. 188 (1982), judicial review was entirely barred insofar as the plaintiffs challenged the Secretary's instructions in the Part B program. *Ringer*, slip op. 5 n.4.[2] Thus, the court below

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[2]Petitioners contend (Pet. 16-17) that the Court's decision in *McClure* indicates that challenges to the administration of the Part B Medicare Program that are "collateral" to a claim for benefits are not barred by the rationale of *Erika*. This contention is without merit. The Court did not even address the question of the district court's jurisdiction in *McClure*. Moreover, *McClure* involved a challenge to the constitutionality of the provisions of the Social Security Act that vested final adjudicatory authority in the carriers. Special considerations weigh against construing a statute to preclude a constitutional challenge to an Act of Congress. Cf. *Johnson* v. *Robison*, 415 U.S. 361, 366-367 (1974). *McClure* does not remotely suggest that a district court has jurisdiction to entertain any type of challenge to the administration of the Part B Program that may be characterized as "collateral" to a claim for benefits. Petitioners, for example, contend (Pet. 16-17) that judicial review is available because their APA challenge is "procedural" rather than "substantive" in nature. This Court in *Ringer* rejected precisely that sort of attempt to evade the bar to judicial review. Slip op. 10-13, 18-20.

In addition to challenging the Secretary's instructions on APA grounds, petitioners contended below that the instructions (i) violated their due process rights under the Fifth Amendment because they were issued without notice and comment and were arbitrary and capricious, and (ii) violated their equal protection rights under the Fifth Amendment because the limitations differed from those applicable to other Part B services, resulted in methods of reimbursement for CT scans under Part B that were different from those under Part A, and resulted in reasonable charge calculations in Region IV that were different from those in other regions. C.A. App. 15-17. In its first opinion, the court of appeals rejected as "frivolous" petitioners' due process claim of a right

correctly held on remand following *Ringer* that petitioners' APA challenge to the carrier instructions affecting the amount of benefits payable for CT scans under Part B is precluded by 42 U.S.C. 1395ff (Pet. App. 3).[3]

The conclusion reached by the court below also is identical to that reached by the Sixth Circuit in the other Part B Medicare case that was remanded by this Court for further consideration in light of *Ringer*. The Sixth Circuit in that case, like the Fourth Circuit in the instant case, previously had held that the district court had jurisdiction to entertain a challenge to a regulation affecting the carrier's calculation of the amount of benefits for particular Part B services. *Michigan Academy of Family Physicians* v. *Blue Cross & Blue Shield*, 728 F.2d 326 (6th Cir. 1984). However, as in the instant case, this Court granted the Secretary's petition for a writ of certiorari, vacated the judgment of the court of appeals, and remanded for further consideration in light of *Ringer*. *See Heckler* v. *Michigan Academy of Family Physicians*, No. 84-120 (Oct. 1, 1984). On remand, the Sixth Circuit concluded in a brief per curiam order "that the principles stated by the Supreme Court in *Heckler* v. *Ringer* require us to find that the federal courts lack jurisdiction over the present case," and the court "therefore remand[ed] the cause to the United States District Court for the Eastern

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to notice and comment. Pet. App. 21 n.4. Petitioners' other constitutional arguments also are wholly insubstantial, and it therefore is unnecessary to consider whether Congress has barred judicial review of constitutional questions arising in the administration of the Part B Program. Compare *Heckler* v. *Ringer*, slip op. 5 n.4.

[3]Because Congress has precluded all judicial review of the amount of benefits under Part B, petitioners' contention (Pet. 24-27) that the district court in this case had jurisdiction under the mandamus statute, 28 U.S.C. 1361, even if not under 28 U.S.C. 1331, is without merit.

District of Michigan with instructions to dismiss." *Michigan Academy of Family Physicians* v. *Blue Cross & Blue Shield*, 751 F.2d 809, 809-810 (6th Cir. 1984).

Nor is there a conflict with the decision of any other court of appeals that warrants review by this Court. All of the appellate cases upon which petitioners rely (see Pet. 14-15, 18-19, 24) were decided prior to *Ringer* and thus have no continuing precedential force. For example, in *National Ass'n of Home Health Agencies* v. *Schweiker*, 690 F.2d 932 (D.C. Cir. 1982), cert. denied, 459 U.S. 1205 (1983), the District of Columbia Circuit held that 42 U.S.C. 405(h) does not bar a suit seeking to vindicate an interest in procedural regularity. This Court rejected that very contention in *Ringer*. Slip op. 10-12. For this reason, the Eleventh Circuit recently concluded that *National Ass'n of Home Health Agencies* is no longer good law in light of *Ringer*. *American Federation of Home Health Agencies, Inc.* v. *Heckler*, No. 84-7228 (Nov. 6, 1984). See also *Ganem* v. *Heckler*, 746 F.2d 844, 848 (D.C. Cir. 1984) ("whether a claimant challenges the procedures used by the Secretary to reject a claim or challenges the substantive basis for that rejection, § 405(h) makes § 1331 jurisdiction unavailable").[4]

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[4]Similarly, in *College of American Pathologists* v. *Heckler*, 734 F.2d 859 (D.C. Cir. 1984), another pre-*Ringer* decision, the court, citing *National Ass'n of Home Health Agencies*, held that 42 U.S.C. 405(h) does not bar review where review is not available under the Social Security Act itself. 734 F.2d at 862. This Court in *Ringer* rejected that construction of 42 U.S.C. 405(h). Slip op. 19. Moreover, in finding the alternative preclusion of review under *Erika* inapplicable, the court in *College of American Pathologists* relied on an analysis of preclusions of review of the sort this Court rejected in *Block* v. *Community Nutrition Institute*, No. 83-458 (June 4, 1984), slip op. 10, and a distinction, rejected in *Ringer*, between a suit challenging the actual amount of benefits and a suit challenging the procedures used in calculating that amount. 734 F.2d at 862-863.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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